Bank Kerjasama Rakyat Malaysia Bhd v Kamaju Hartamas Sdn Bhd (previously known as Arus Suasana Sdn Bhd) & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22M-59–06 OF 2013
YUSRIN FAIDZ JC
13 JUNE 2024

Contract — Breach — Damages — Whether defendant was entitled to damages naturally flowing from plaintiff's wrongful termination of the contract — Whether the damages claimed were foreseeable

The first defendant ('D1') was approved a RM9,846,000 Islamic bridging-finance by the plaintiff to buy land ('the project land') to carry out a RM45m housing project ('the project'). The monies were to be released to D1 in three tranches. However, on the ground that D1 had defaulted after disbursement of the first tranche ofRM3,345,000, the plaintiff terminated the entire facility and sued D1 for all monies owing. D1 disputed the claim and counterclaimed for loss of profits and all losses it had suffered as a consequence of the plaintiff's alleged breaches under the agreement between them including wrongful termination of the facility. D1 settled the plaintiff's claim. The High Court dismissed the counterclaim after a hearing. Finding that the plaintiff's termination of the facility was wrongful, the Court of Appeal reversed the High Court's decision and ordered the damages payable to D1 to be assessed by the registrar of the High Court. D1 claimed loss of profit in the sum of RM33,152,263.33 for the project; alternatively, losses amouting to RM15,140,156.15 for the first phase. After several hearings, the registrar found, inter alia, that the plaintiff's termination of the facility was not direct cause of any loss suffered by D1 and therefore D1 had not proven its claim. The registrar awarded D1 nominal damages of RM5,000 and RM17,000 in costs. D1 appealed to the judge-in-chambers against the decision.

Held, allowing D1's appeal, setting aside the registrar's decision and awarding D1 RM7,506,518.67 in damages with interest at 5%pa on the judgment sum from 6 June 2016 until realisation and RM30,000 costs:

(1) Considering all the evidence, the plaintiff's wrongful termination was the sole cause of the project's failure and the resultant loss to D1. D1's loss of profit on the project was a natural and probable result of the plaintiff's breach of the agreement. The loss of profit was well within the contemplation of the parties (see paras 49, 57 & 62).

(2) D1 was entitled to the loss of profit of RM15,140,156.15 (ie, up to Phase 1) based on the approved development order of 40 units of

two-storey semi-detached houses. From that sum, deductions had to be made for income tax payable by D1 (RM3,633,637.48) and the amount D1 had received (RM4m) from the sale of the project land (see paras 63 & 65–66).

[Bahasa Malaysia summary

Defendan pertama ('D1') telah diluluskan pembiayaan perantara Islamik berjumlah RM9,846,000 oleh plaintif untuk membeli tanah ('tanah projek') untuk menjalankan projek perumahan RM45 juta ('projek tersebut'). Wang tersebut akan dilepaskan kepada D1 dalam tiga peringkat. Walau bagaimanapun, atas alasan bahawa D1 telah ingkar selepas pembayaran tranche pertama sebanyak RM3,345,000, plaintif menamatkan keseluruhan kemudahan dan menyaman D1 untuk semua wang yang terhutang. D1 mempertikaikan tuntutan itu dan menuntut balas untuk kehilangan keuntungan dan semua kerugian yang dialaminya akibat daripada dakwaan kemungkiran plaintif di bawah perjanjian antara mereka termasuk penamatan kemudahan secara salah. D1 menyelesaikan tuntutan plaintif. Mahkamah Tinggi menolak tuntutan balas itu selepas perbicaraan. Mendapati bahawa penamatan kemudahan plaintif adalah salah, Mahkamah Rayuan membatalkan keputusan Mahkamah Tinggi dan memerintahkan ganti rugi yang perlu dibayar kepada D1 ditaksir oleh pendaftar Mahkamah Tinggi. D1 mendakwa kehilangan keuntungan dalam jumlah RM33,152,263.33 bagi projek itu; sebagai alternatif, kerugian berjumlah RM15,140,156.15 untuk fasa pertama. Selepas beberapa perbicaraan, pendaftar mendapati, antara lain, bahawa penamatan kemudahan plaintif bukan punca langsung bagi sebarang kerugian yang dialami oleh D1 dan oleh itu D1 tidak membuktikan tuntutannya. Pendaftar memberikan ganti rugi nominal D1 sebanyak RM5,000 dan kos RM17,000. D1 merayu kepada hakim dalam kamar terhadap keputusan itu.

Diputuskan, membenarkan rayuan D1, mengetepikan keputusan pendaftar dan memberikan award D1 ganti rugi RM7,506,518.67 dengan faedah pada kadar 5% setahun ke atas jumlah penghakiman dari 6 Jun 2016 sehingga penyelesaian dan kos RM30,000:

(1) Mengambil kiura semua keterangan, penamatan salah plaintif adalah satu-satunya punca kegagalan projek dan mengakibatkan kerugian kepada D1. Kehilangan keuntungan D1 dalam projek itu adalah hasil semula jadi dan berkemungkinan daripada pelanggaran perjanjian plaintif. Kehilangan keuntungan adalah dalam kontemplasi pihak-pihak (lihat perenggan 49, 57 & 62).

(2) D1 berhak mendapat kehilangan keuntungan sebanyak RM15,140,156.15 (iaitu, sehingga Fasa 1) berdasarkan perintah pembangunan yang diluluskan bagi 40 unit rumah berkembar dua tingkat. Daripada jumlah itu, potongan perlu dibuat untuk cukai

pendapatan yang perlu dibayar oleh D1 (RM3,633,637.48) dan jumlah yang D1 terima (RM4 juta) daripada penjualan tanah projek (lihat perenggan 63 & 65–66).

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)
Banco De Portugal v Waterlow & Sons, Ltd [1932] AC 452, HL (refd)
Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)
Bank Kerjasama Rakyat Berhad v Kamuja Hartamas Sdn Bhd & 2 Ors [2014] 1 LNS 1844, HC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited [1912] AC 673, HL (refd)
Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors [2004] 1 MLJ 657, CA (refd)
Bwllfa and Merthyr Dare Steam Collieries Ltd v Pontypridd Waterworks Co [1903] AC 426, HL (refd)
Double Advantage Sdn Bhd v Paduan Hebat Sdn Bhd & Anor [2017] MLJU 1427, CA (refd)
Hadley v Baxendale [1854] 9 Exch 341 (folld)
Hamdan bin Johan & Ors v FELCRA Bhd & Ors [2010] 8 MLJ 628; [2010] 3 CLJ 474, HC (refd)
Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd [1991] 2 MLJ 311; [1990] 2 SLR 1234, HC (refd)
Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd [2017] 3 MLJ 668, CA (refd)
Poh Geok Sing v HB Enterprise Sdn Bhd [2006] 1 MLJ 617, CA (refd)
Robinson v Harman [1843–60] All ER Rep 383 (refd)
Seloga Sdn Bhd v UEM Gynisys Sdn Bhd [2007] 7 MLJ 385; [2008] 2 CLJ 686, CA (distd)
Takashimaya Construction & Development Sdn Bhd & Anor v My Influx Sdn Bhd and other appeals [2020] 6 MLJ 289, CA (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Legislation referred to

Contracts Act 1950 s 74, 74(1), (2)
Income Tax Act 1967 s 4(a)
Rules of Court 2012 O 32 r 9, O 37 r 1, O 56 r 1

Mohd Munzeer bin Zainul Abidin (with Mohd Zaid Daud) (Yusfarizal Aziz & Zaid) for the plaintiff.
Jason Chan (with Lee Xin Yi and Nur Fatihah) (S Mathews & Assoc) for the first defendant.

Yusrin Faidz JC:

INTRODUCTION

[1] In the realm of contractual obligations, parties enter agreements with the expectation that each side will honor their commitments. When one party fails to uphold their end of the bargain, the resulting breach can cause significant harm to the other. In the timeless words of William Shakespeare, 'what's done cannot be undone'. This phrase poignantly captures the essence of the court's deliberations in this appeal. In this case, the plaintiff's breach of contract has set in motion a series of irreversible consequences, necessitating the imposition of appropriate remedies to address the damages incurred. The task of this court is to ensure that justice is served by quantifying and awarding the aggrieved party with fair compensation for their losses.

BACKGROUND FACTS

[2] The first defendant ('D1') under its former name, 'Aras Suasana Sdn Bhd' sought funding from the plaintiff to part finance the purchase of a 12.312-acre land known as Lot Nos 3222, 3223 and 3224, Mukim Dengkil, Daerah Sepang, Selangor ('the project land'), and the subsequent construction of 110 terrace houses and 34 semi-detached houses on it ('the project'). The plaintiff evaluated the application, conducted a feasibility study, and approved a bridging finance facility of RM9,846,000, divided into three tranches in 2008 ('the said facilities'). The second and third defendants ('D2' and 'D3') stood as guarantors.

[3] Tranche 1 in the sum of RM3,345,000 was disbursed based on the principle of *Al-Bai Bithaman Ajil* ('BBA'). Following this, the project land was charged to the plaintiff as security to the BBA facility. Tranche 2 was for RM500,000 to be used for infrastructure work, and Tranche 3 was for the sum of RM6m to part finance the construction costs. These two tranches were based on *Bai' Al Istisna'* Financing. Under these agreements the plaintiff was obliged to construct and complete the project and deliver to D1 the completed project. In the exercise of its rights under the agreement, the plaintiff appointed D1 to complete the project.

[4] Based on Islamic principles as well as the general terms applicable to the

bridging finance, there were special conditions imposed by the plaintiff which can be summarised as follows: A

(a) that the plaintiff will earn profit of RM2,732,265, with a processing fee of RM12,308;

(b) plaintiff shall be one of the end-financiers for the project and D1 makes best effort to extend at 30% of the end-financing to the plaintiff; B

(c) all legal documentation shall be handled by plaintiff's panel lawyer only; and

(d) D1 shall include on the signboard put up at the site to signify that the project is financed by the plaintiff together with the use of the plaintiff's logo. C

[5] Tranche 2 and 3 were not disbursed as D1 was said to have defaulted resulting in the termination of the facilities by the plaintiff. D

[6] The plaintiff filed an action against the defendants in Suit No D-22A–743 of 2010 claiming the sum due under Tranche 1. However, the said action was withdrawn with liberty to file afresh, in order to allow settlement negotiations between parties. E

[7] Kamuja Corp Sdn Bhd ('Kamuja Corp') which took over D1, renaming it 'Kamuja Hartamas Sdn Bhd', modified the project several times, ultimately proposing to build 66 units of two-storey semi-detached houses, and requested a restructuring of the said facilities from the plaintiff. Nevertheless, the plaintiff terminated the facilities on 6 June 2013. F

[8] As negotiations failed, the plaintiff filed this current suit on 25 June 2013 to claim the sum of RM3,600,768.90 from the defendants. Default judgment was entered against D3 on 17 July 2013. The claim against D2 was not pursued as he was an adjudged bankrupt. D1 disputed the plaintiff's claim, and filed a counterclaim for compensation for loss of profit and all losses suffered as a consequence of the plaintiff's breaches of the terms and conditions of the agreement as well as for wrongful termination of the facility. Alternatively, D1 claimed that it ought to be accorded the relief of specific performance of the bridging finance as per the plaintiff's letter of offer dated 8 August 2008. G H

[9] After a full trial and just before the decision was delivered, D1 paid the amount claimed by the plaintiff. Consequently, the plaintiff withdrew the main claim. However, D1 was adamant about pursuing their counterclaim. I

Based on the evidence presented during the trial, the High Court delivered its decision on the counterclaim, ultimately dismissing it on 21 July 2014. The

grounds of judgment of the High Court can be found in *Bank Kerjasama Rakyat Berhad v Kamuja Hartamas Sdn Bhd & 2 Ors* [2014] 1 LNS 1844.

[10] D1 appealed to the Court of Appeal via Appeal No W-02(MUA)(W)-1322–08 of 2014. On 20 April 2015, the Court of Appeal reversed the High Court's decision, awarding costs of RM30,000 and ordering that damages be assessed by the Registrar of the High Court. The plaintiffs bid for leave to appeal to the Federal Court was denied on 4 July 2017, closing the chapter on the issue of liability.

[11] The grounds of the Court of Appeal can be found in *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* [2017] 3 MLJ 668. In particular, the High Court was to assess damages based on the fact that the notice of termination issued by the plaintiff vide letter dated 6 June 2013 was wrongful and in breach of the facilities; and that specific performance to be accorded based on the plaintiff's letter of offer dated 8 August 2008.

[12] In essence, D1 claims damages in terms of loss of profit in the sum of RM33,152,263.33, or in the alternative losses for Phase 1 in the sum of RM15,140,156.15. Upon assessment hearing held on 25 July 2019, 26 July 2019, 3 October 2019, 6 December 2021, 7 December 2021, and 17 December 2021, during which three witnesses from each side were examined, the learned Registrar found that D1 was unable to prove their claim for damages, resulting in an award of nominal damages in the sum of RM5,000 with costs of RM17,000 in favour of D1.

[13] Dissatisfied with the said sum D1 appealed to judge in chambers vide notice of appeal dated 11 April 2023 (encl 130). On 5 January 2024, upon hearing of the substantive appeal, I allowed D1's appeal and awarded damages in the sum of RM7,506,518.67, with interest of 5%pa on the judgment sum from 6 June 2016 till realisation together with RM30,000 costs.

ISSUES

[14] The appeal addresses the following issues:

(a) whether an appeal to a judge in chambers should be treated as a rehearing or based on a case stated ('standard of review');

(b) whether the project's failure resulted from the termination of the facilities ('causation');

(c) whether damages claimed by D1 fall within the parties' contemplation ('foreseeability'); and

(d) how much in damages D1 is entitled to, considering the relevant factors and the impact of the unlawful termination on D1's business operations. ('quantum of damages').

STANDARD OF REVIEW

Counsels' contention on the standard of review

[15] On this issue, the plaintiffs learned counsel, Mohd Munzeer bin Zainul Abidin argues that appeal before me should be by way of case stated. This would mean that the standard of review should take into account the fact that the Registrar had heard witnesses orally, observe their demeanour under cross-examination and assess their credibility. On appeal, therefore, I ought to be slow to disturb the Registrar's findings of fact which were dependent upon his assessment of the witnesses before him, an advantage which I did not have.

[16] Whereas D1's learned counsel, Dato' Jason Chan argues that such appeal should be by way of rehearing; in that I am at liberty to intervene with the Registrar's findings of fact and to exercise my discretion in an unfettered manner if the circumstances and evidence warranted such intervention.

Court's findings on the standard of review

[17] As the Court of Appeal has already decided the issue of liability, the hearing before the Registrar is essentially a bifurcated procedure aimed at completing the fact-finding aspect of the trial in respect of quantum of damages. The Registrar's powers and duties under such procedure is governed by O 37 r 1 of the Rules of Court 2012 ('the Rules) which states as follows:

> 1 Assessment of damages by Registrar (O 37, r 1)
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> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

[18] Whilst the Registrar's delegated jurisdiction is based on O 32 r 9 of the Rules, which states as follows:

> 9 Jurisdiction of Registrar (O 32, r 9)
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> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these Rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as

A the Chief Judge may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person.

B **[19]** Considering the general purpose of such delegation is to enhance administrative efficiency, and that registrars are exercising powers and jurisdiction devolved to them from those vested in a judge, an appeal which emanates from the registrar to judge in chambers by way of O 56 r 1 of the Rules is not an 'appeal' in the true sense unlike an appeal from a decision of a High Court judge to the Court of Appeal. As per the Singapore High Court C case of *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1991] 2 MLJ 311; [1990] 2 SLR 1234 at [11]—[12], in such a scenario, a judge in chambers is considered to be exercising confirmatory jurisdiction rather than appellate jurisdiction wherein such 'appeal' is to be by way of a rehearing.

D **[20]** Be that as it may, as highlighted by the plaintiff's counsel, the facts of this case is rather different in that the assessment procedure presided by the Registrar was based on documents as well as oral testimony of 6 witnesses taken by him. If it had been purely documentary evidence, I would have little E difficulty in deciding the matter afresh as all the necessary evidence, materials and information would be before me.

[21] I partially agree with the plaintiff's counsel on this point. Therefore, the standard of review to be adopted in this case is a mixed form: while I have the F authority to exercise my discretion anew and treat this as a rehearing, I must give due weight and deference to the Registrar's findings of fact based on the oral evidence. Consequently, the Registrar's findings of fact, whether based wholly or partially on the oral evidence, may only be overturned if they are G plainly wrong or contrary to the weight of the evidence.

CAUSATION

Counsels' contentions on the issue of causation

H **[22]** The plaintiff argues that it is a finding of fact of the Registrar that D1 's failure to proceed with the project was not a direct consequence of the plaintiffs termination and therefore there is no damages proven under limb (a) of s 74 of the Contracts Act 1950. It is further argued that such finding of fact is correct I and should not be disturbed. The following reasoning can be extracted from the Registrar's grounds of judgment:

(a) D1 has failed to produce any contemporaneous documents to show that the wrongful termination by plaintiff had directly or adversely affected the project (para 89, grounds of judgment in end 136 ('GOJ'));

(b) the voluntariness and readiness of D1 to redeem the project land even before the termination indicated that it was already securing funds from other financiers and was prepared to redeem the project land and did not have to rely on the facilities to fund the project (paras 91 and 95(i) of GOJ);

(c) D1 did not indicate to the plaintiff that the termination of the facilities had and would have jeopardised the project (para 92 of GOJ);

(d) D1 did not adduce evidence to show that the sale of the project land was a result of the termination aras 93–95(ii) of GOJ);

(e) D1 did not adduce evidence to show its financial position to continue and subsequently complete the project and the effect of the termination thereto (para 95(iii), (iv) and (v) of GOJ); and

(f) there was no evidence as to expenditures incurred by D1 (para 95 (iv) of GOJ).

[23] On the other hand, D1 argues that under s 74 of the Contracts Act 1950, they have proven that the losses they suffered were caused by the plaintiff's unlawful termination and are therefore entitled to the benefit of the bargain (see *Hamdan bin Johan & Ors v FELCRA Bhd & Ors* [2010] 8 MLJ 628; [2010] 3 CLJ 474). D1's counsel further buttressed this submission by explaining how the learned Registrar's findings are wrong and plainly contrary to the weight of the evidence.

The court's findings on the issue of causation

[24] A party seeking damages must demonstrate that the breach of contract was the underlying cause of their loss. Our position on compensation for loss or damage as consequence of a breach of contract is set out in s 74(1) of the Contracts Act 1950, which states as follow:

> 74 Compensation for loss or damage caused by breach of contract
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> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, *which naturally arose in the usual course of things from the breach*, or *which the parties knew, when they made the contract, to be likely to result from the breach of it.*

[25] Section 74(2) reinforces this by providing that 'such compensation is not to be given for any remote or indirect loss or damage sustained by reason of breach'.

[26] This distinction between damages towards losses, that naturally arise in the usual course of things (first limb) and losses that the parties knew, at the

time of making the contract, to be likely to result from a breach of the contract (second limb), appears to be borrowed from the principle laid down in the celebrated English decision of *Hadley v Baxendale* [1854] 9 Exch 341.

[27] Under the first limb of s 74(1), the innocent party to a contract which has been breached may be compensated for any loss or damage that arises naturally in the usual course of things. As per Cheong May Fong & Lee Yin Harn in *Civil Remedies* (2nd Ed) (2016), illustrations (a), (b), (c), (f), (g) and (h) to s 74(1) provide possible factual scenario and examples of loss falling under the first limb.

[28] Under the second limb of s 74(1), damages are recoverable for loss or damage resulting out of a breach of contract if the parties knew, when they made the contract, that the loss or damage was likely to result from the breach of it. As per *Civil Remedies*, illustrations (i), (j) and (i) to s 74(1) provides examples of loss falling within the second limb.

[29] The question of whether termination is unlawful has been addressed in the affirmative by the Court of Appeal. Based on the grounds of judgment of CA in *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* (at paras 14–16) it is clear that the Court of Appeal was of the view that evidence at trial showed parties reached an understanding to restructure and extend the tenure of the facilities. Rohana Yusuf JCA (as Her Ladyship then was), went to elaborate that the plaintiff's termination letter itself evidenced proposal to restructure the said facilities, and found that the plaintiff's termination letter did not contain any valid reason to terminate.

[30] The only question that the Court of Appeal had doubts about was whether based on the evidence presented during trial that the damages proposed by D1 for wrongful termination could be granted as evidence adduced then did not show that D1 could take up the project. The Court of Appeal's direction is clear as to the issues to be taken focused upon by the Registrar during assessment:

> [27] In our view whether or not there was a challenge posed on the report by DW1, the first defendant would have to first establish what are the damages resulting from the wrongful termination. For example it cannot be assumed that the wrongful termination per se had caused the project to scuttle. There is evidence as submitted by learned counsel for the plaintiff that the first defendant was in no financial position to complete the project which required RM45m to complete in the first place. Even if the plaintiff had disbursed the two tranches it would be for only RM9,846,000 which would not suffice to complete a RM45m project. We do not agree therefore that the damages claimed by the first defendant should simply be

based on the project amount after deducting the profit to the plaintiff per se, as loss suffered by the first defendant.

[28] For the above reasons, we make an order for the damages to be assessed before the registrar. The damages suffered if any is to be assessed on the basis that they are damages suffered as a consequence of the unlawful termination. We therefore allowed the appeal by the first defendant with costs and remitted the case to the High Court before the registrar for damages to be assessed.

[31] Concerning the issue of D1's willingness and readiness to redeem the project land since October 2012, which was eight months prior to the termination, I believe the Registrar erred in his factual finding. The grounds of judgment (GOJ) in encl 136 do not elucidate how the Registrar reached this conclusion. It can be inferred that the Registrar referred to D1's letter dated 5 October 2012 (pp 276–277 of B3 at encl 89). Therefore, it is crucial to consider the context of this letter. Upon examining it, it is evident that D1 issued the letter in response to the plaintiffs demand letter dated 25 September 2012, which sought the outstanding sum under the facility and threatened legal action against D1. It is to be noted that in D1's letter dated 5 October 2012, they requested the plaintiff to reconsider their restructuring and refinancing proposal to ensure the successful execution of the project. This indicates that D1 required the facility for the project's success and hoped the plaintiff would be amenable to restructuring the facility, given that the development order for part of the project land had been successfully obtained.

[32] Subsequently, the plaintiff issued another demand on 25 February 2013, informing D1 to propose a settlement or face legal suits and foreclosure proceedings for the project land (page 207 of B3 at encl 89). Confronted with these threats, D1 had no choice but to write to the plaintiff on 28 February 2013 (page 281 of B3), seeking to redeem the project land to avoid foreclosure. Therefore, I do not believe that D1 voluntarily requested to redeem the project land, as the Registrar found.

[33] This view is supported by the Court of Appeal's findings that the plaintiffs demand and termination letter were wrongful and constituted a breach of contract. Consequently, the Registrar's assessment seems flawed for not considering that D1 's proposal or request to redeem the project land came under undue pressure. This pressure stemmed from the plaintiffs threat to terminate the facilities and foreclose on the project land unless D1 repaid the entirety of the debt.

[34] On the issue of disposal of the project land by D1 in 2018, the Registrar found that the sale signifies the lack of intention to proceed with the project. In general, a bank could hypothetically, have many reasons to not fund its lending commitments. At times of market turbulence, cashflow constraints could

require it to consider its own competing creditors. In situations where a bank remains solvent but, for whatever reason withholds funding, an aggrieved borrower is left with two options. Firstly, faced with such repudiation or an anticipatory breach, the borrower can choose to affirm the facility and treat it as remaining on foot to be remedied by specific performance. In such a situation, there is no breach of contract and no remedy will be available until the time for performance arrives. The question of loss mitigation does not arise since there is no actionable breach. Secondly, the borrower may choose to accept the repudiation, sue for breach and seek damages. In such a case, the principle of mitigation will apply, and the borrower will not be able to recover for losses which it could have taken reasonable steps to avoid.

[35] I can appreciate the confusion faced during the assessment hearing. This is because difficulties arise in this case when the plaintiff initially opted to treat the facilities as remaining on foot and sued for specific performance with damages in lieu; and upon specific performance being awarded in 2017, disposed the very land on which the project is to be carried out. Does the disposal of the project land signify a refusal to complete the project or should it be seen as an effort to mitigate damages? Although I question the reasonableness of such sale, based on the evidence, I believe it should be considered as mitigation of damages.

[36] Here, D1 argues that despite their initial intention to proceed with the project, they had no option but to dispose of the project land in 2018. In essence, DW3 testified that the decision to sell was made after the plaintiff's leave to appeal to the Federal Court was dismissed on 4 July 2017 wherein at that point in time the development order has already lapsed and that the property market has taken a turn (p 300 of notes of evidence in encl 111). In any event, even if extension of the development order was granted, I believe it would be nearly impossible for D1 to proceed with the project in 2017 based on the specific performance of the 2008 facilities, given the increase in prices of construction materials and the overall development cost. Thus, I believe that the testimony of DW3 on this issue was overlooked by the Registrar.

[37] Further to this, the findings of the Court of Appeal on this issue should be taken as guidance in the Registrar's assessment. This is so as the Court of Appeal had highlighted in *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* (at para 11) as follows:

> [11] It was because of the delay in obtaining the development order, a situation which was beyond the control of the first defendant, the first defendant sought for restructuring of the facilities to a further three year period. The first defendant caused two letters of 8 July 2012 and 27 August 2012 to be written to the plaintiff to propose the restructuring. Also offered by the first defendant in the said letter was

to give a memorandum of deposit in the sum of RM1m as a further security. The plaintiff kept silent and did not respond. The first defendant also could not proceed to obtain the subdivision of the land to carry out the project because the plaintiff withheld the required consent. There was not an explanation on the reason for withholding the consent except that in the trial PW3 who testified on behalf of the plaintiff said the reason for withholding was because the plaintiff intended to foreclose the land. Despite appeals by the first defendant the plaintiff did not give its consent. Instead, the plaintiff terminated the facilities.

[38] I am of the view that the Registrar is entitled to look into facts and events occurring after a breach as they are admissible for the purposes of assessing damages. These facts are preferable as it reflects the true events. In the English case of *Bwllfa and Merthyr Dare Steam Collieries Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL), the House of Lords held, inter alia:

... the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion, it is his duty ... to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? (at 413)

[39] Further, the Registrar should look at the circumstances in which the sale of project land was made, and to decide whether D1 had acted reasonably in mitigating their loss. As per Lord Macmillan in the English case of *Banco De Portugal v Waterlow & Sons, Ltd* [1932] AC 452 at 506:

Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

[40] Abdul Hamid Omar LP in the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 (SC) at p 89, recognises the fact that it is common knowledge that where a financial institution withdraws its financial facility from a developer engaged in housing project, it becomes virtually impossible for the developer to obtain financial facilities from alternative sources.

[41] Be that as it may, the principle that an innocent party cannot recover losses that could have been reasonably mitigated is also embodied in s 74 of the

Contracts Act 1950. The explanation to s 74 states as follows:

> In estimating the loss or damages arising from a breach of contract, the means which existed of remedying the inconvenience caused by the nonperformance of the contract must be taken into account.

[42] Harmindar Singh Dhaliwal in M*itigation of Damage: When Should a Gain or Benefit (or Betterment) That Accrues to a plaintiff be Taken into Account in Assessing the Damages Payable by a Defendant* [2004] 4 MLJ xxviii-xl states as follows:

> Mitigation is concerned with the avoidance of the consequences of a wrong, whether a tort or a breach of contract. Damages to be awarded to the plaintiff may be reduced either where there has been a failure by the plaintiff to take reasonable steps to reduce loss or where steps have been taken which have in fact reduced the loss. It may sometimes be the case that as a result of the breach of the defendant, some benefit or gain accrues to the plaintiff. In other words, the action of the plaintiff in response to the defendant's breach has resulted in a material improvement in his or her position. The question that arises is whether in such a situation, the plaintiff will be able to recover such mitigation benefits or will damages have to be reduced to take into account such benefit or gain.

[43] In situation of a developer whose bank loan has been unlawfully terminated, I am of the view that the duty to mitigate damages means the developer must take reasonable actions to reduce the financial impact caused by the termination. Firstly, the developer should actively seek other sources of funding, such as applying for loans from different banks or financial institutions. Failing to attempt to secure alternative financing could be seen as not fulfilling the duty to mitigate damages. Secondly, the developer might need to adjust the project's scope or timeline to align with the new financial reality. This could involve scaling back certain aspects of the development, delaying some parts of the project, or finding cost-saving measures. Thirdly, beyond traditional loans, the developer should consider other financing options like private investors, capital injection from a parent company, or crowdfunding if feasible.

[44] From the facts of the case, while it may be easy for the plaintiff to cast aside D1 and demand they immediately seek funds elsewhere, the situation is far more complex for D1, given that the installments under Tranche 1 are already outstanding. For D1 to secure alternative financing, they must repay the outstanding amount and release the plaintiff's security over the project land. I find that it is unjust for the plaintiff to claim that D1 had no intention of carrying out the project and failed to start work when, in reality, it was the plaintiff's actions that forced D1 into this dire predicament. Consequently, the plaintiffs actions have significantly hampered D1's ability to proceed with the project as intended as well as to fully exercise their duty to mitigate damages,

underscoring the need for a thorough reassessment of the circumstances and the Registrar's findings in this matter.

[45] On the issue of D1's financial standing, it was found by the learned Registrar that D1 failed to adduce any evidence to prove its financial capability to complete the project had the plaintiff not terminated the facilities. On the contrary, having considered the type of loan involved, and having analysed the plaintiff's own feasibility study, I am of the view that D1 would have ample funds to finance the project.

[46] In essence, the type of facility, ie a bridging loan, explains how the project would be adequately funded. Such loan is a short-term facility intended to provide quick access to funds. In this case it is used to help D1 as a property developer to 'bridge the gap' during the period of acquisition and development of the project land whilst waiting for funds to become available from the sale of the property they are developing.

[47] From the feasibility study of the plaintiff, it is clear that D1 would need to use their internal fund of RM1,434,000 to purchase the project land, and RM2,636,000 to develop the same. The bridging loan was catered for D1 to manage its liquidity and fund the project and is not intended to cover the entire cost of the project as such cost would be funded by the end-buyers or purchasers' financiers. As per the plaintiff's own feasibility study, it was estimated that the sum of RM21,668,000 would come from this source. The plaintiff's facilities of RM9,846,000 was estimated to cover only 27% of the entire development costs.

[48] From the evidence, it is clear that D1 had the required funds. Such financial capability was exhibited in D1's ability to pay the sum of RM3,684,694.25 in order to redeem the project land to avoid foreclosure action by the plaintiff. Thus I am agreeable with D1 's submission that to allow plaintiff to say that D1 has no internal funds to carry out the project, when it was the plaintiff who terminated the facilities and forced D1 to utilise its cash reserve to redeem the project land would be akin to a contract breaker to benefit from its own wrongdoing (see *Poh Geok Sing v HB Enterprise Sdn Bhd* [2006] 1 MLJ 617, and *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697).

[49] In short, by canceling the facilities and compelling D1 to use its internal funds to redeem the project land, the plaintiffs wrongful termination is the sole cause of the project's failure and the resultant loss to D1 (see: *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1).

A FORESEEABILITY

Counsels' contention on the issue of foreseeability

B **[50]** The plaintiff argues that the Registrar had made the correct findings in that the damages claimed by D1 are not within the contemplation of the plaintiff. This is because the plaintiff's feasibility study was made on the first proposal instead on the fourth proposal of D1.

C **[51]** Whereas D1 argues that their reliance on the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Anor* is well founded and that the Registrar is wrong in revisiting and reopening the issues duly ventilated and determined by the Court of Appeal.

D *The court's findings on the issue of foreseeability*

[52] Specific to the issue at hand it is trite that in cases where a bank breaches its contract with a customer by unlawfully terminating financing to that customer, the customer may suffer loss of the profits which he expected to E obtain through the use of the funds, particularly where the financing is intended to fund a development project (see *Bank Bumiputra Malaysia Bhd, Kuala Terengganu v MAE Perkayuan Sdn Bhd & Anor*, and *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors* [2004] 1 MLJ 657 (CA)).

F **[53]** In *Bank Bumiputra Malaysia Bhd, Kuala Terengganu v MAE Perkayuan Sdn Bhd & Anor,* Abdul Hamid Omar LP held that (at p 89):

> It will be seen that the law in this country as to the measure of damages for breach of contract as provided under s 74 of the Contracts Act 1950 is the same as in G England, and requires that the damage or loss suffered must be within the contemplation of both parties. In this case, the bank had full knowledge from the very beginning that the project, if successfully and duly completed, would bring in a profit of about RM5.3m to the first respondent. The bank had studied every aspect of the project and had decided what amount was required by the first H respondent as bridging finance before the first respondent could be expected to derive a profit from sales of dwelling houses. Once the first respondent commenced to derive such profit, it could be expected to apply the same towards reduction of its overdraft with the bank and completion of the project. It is public and common knowledge that where a financial institution withdraws its financial facility from a I developer engaged in housing project, it becomes virtually impossible for the developer to obtain financial facilities from alternative sources.
>
> We are, therefore, of the view that the loss of profits on the housing project which the first respondent would suffer was the natural and probable result of the breach of agreement by the bank, and when the bank agreed to provide the bridging finance

to the first respondent, the bank well knew of the loss that the first respondent would incur should the bank break the contract.

[54] In deliberating on the issue of foreseeability, the Registrar ruled that D1 cannot rely on the plaintiff's feasibility study due to the fact that D1 had changed its development proposal wherein the plaintiff's feasibility study does not take into account the changes made by D1 in their latest proposal. The case of *Seloga Sdn Bhd v UEM Gynisys Sdn Bhd* [2007] 7 MLJ 385; [2008] 2 CLJ 686 is relied by the Registrar in ruling that silence from the plaintiff on the proposed variation does not constitute acceptance of the same.

[55] I am of the view that the facts of this case can be distinguished with the facts in *Seloga Jaya* as the plaintiff did not respond or raise any objection to the fourth proposal submitted by D1 on 18 June 2012, and not even after D1 proceeded to obtain the development order dated 6 November 2012 (see DO dated 6 November 2012 at pp 19–33 of Bundle B1 in encl 87).

[56] Further, I am in agreement with D1's submission and reliance on the cases of *Takashimaya Construction & Development Sdn Bhd & Anor v My Influx Sdn Bhd and other appeals* [2020] 6 MLJ 289, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, and *Double Advantage Sdn Bhd v Paduan Hebat Sdn Bhd & Anor* [2017] MLJU 1427, in that having encouraged D1 to believe their acceptance of the fourth proposal and to take further steps in reliance thereof, the plaintiff should be estopped from claiming that the fourth proposal was not within their contemplation.

[57] Therefore, the findings of the Court of Appeal are crucial on this point of foreseeability. There, Rohana Yusuf JCA found that D1 had intended to proceed with the project and for Tranche 2 and 3 of the facilities to be released in order to complete the same. However, the plaintiff refused to disburse the second and third tranches an instead decided to foreclose on the project land by terminating the facilities. Based on the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Anor* the loss of profit on the housing project which D1 would suffer is a natural and probable result of the breach of the agreement by the plaintiff.

QUANTUM OF DAMAGES

Counsels' contention on the issue of damages

[58] The plaintiff argues that the Registrar is correct in granting nominal damages based on the findings that D1 was unable to prove their claim for damages. To counter D1's estimation of loss of profit, the plaintiff asserts that D1 by varying the concept of development had departed from the initial

figures which were anticipated in the plaintiff's feasibility study dated 9 July 2008. The plaintiff points out that if the same is to be examined, it is clear that based on the initial development plan, D1 was to construct 110 units of two-storey terrace houses and 30 units of two-storey semi-detached houses. This would involve a gross development value (GDV) of RM45,040,000, gross development costs (GDC) of RM32,407,341, and an estimated gross profit of RM9,455,375 (21% of GDV). Whilst the latest variation (fourth proposal), D1 planned to construct of 66 units of two storey semi-detached houses. This would involve a GDV of RM82,500,000, with a GDC of RM46.615.471.67, and a gross profit of RM35,884,528.33 (43.5% of GDV). It is submitted by the plaintiff that such increase in gross profit ie from RM9,455,375 to RM35,884,528.33 was not agreed upon and beyond the contemplation of the plaintiff.

[59] Conversely, D1 contends that the Registrar had failed to consider the losses that naturally flowing from the damage which is in terms of loss of loss of profit in the sum of RM33,152,263.33 (after deducting plaintiff's portion of the profit), or in the alternative losses for Phase 1 in the sum of RM15,140,156.15 as approved by the development order dated 6 November 2012.

The court's findings on the issue of damages

[60] Parke B in *Robinson v Harman* [1843-60] All ER Rep 383 at 385 states that:

> The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[61] Nevertheless, this does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. It is always to be remembered that the object of damages is to compensate the claimant, not to punish the defendant. This can be seen in the judgment of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] AC 673 at 689:

> The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach ...

[62] I am of the view that D1's failure to proceed with the project was a direct consequence of the termination by the plaintiff. Therefore, D1 is entitled to damages that naturally flows out of the said termination. As to the quantum,

despite the changes in the scope of the project, I am of the view that the loss of profit was well within the contemplation of parties.

[63] Having examined the facts before me, I am of the view that D1 is entitled to the loss of profit of RM15,140,156.15 ie up to Phase 1 based on the approved development order of 40 units of 2 storey semi-detached houses (see DO dated 6 November 2012 at pp 19–33 of Bundle B1 in encl 87). This is so as there is no approval obtained from the local authorities with regards to the remaining 26 units. Applying s 74(1) of the Contracts Act 1950 and the principle of remoteness as set out in *Hadley v Baxendale*, the claim for the inclusion of loss of the remaining 26 units is dependent on the application of profits from Phase 1 as well as on the approval of the development order on Phase 2 of the project which is too remote.

[64] Further, it is noted that the development cost of the initial 40 units is lower than the development costs for the entire 12.312-acre land as estimated in the plaintiffs feasibility study (RM34,519,843.85 vs RM45,040,000). Therefore, the higher GDV for Phase 1 of the project would be sufficient to cover the construction costs, as the funds ultimately realised from sales to end-buyers (GDV of RM49,660,000) would provide ample financing.

[65] As the aim of damages is to compensate the claimant for the actual loss suffered as a result of a breach, the assessment of damages has to take into account the claimant's liability to pay tax. Hence, to account the element of taxation and applying s 4(a) of the Income Tax Act 1967, the said sum of RM15,140,156.15 should be reduced by 24% income tax (RM3,633,637.48).

[66] Further, as D1 has admitted to having sold the project land, a further deduction of RM4m would be made based on proceeds obtained from the sale. This is so, as held above, the eventual sale of the said project land forms part of the consequence of the termination as well as D1's exercise to mitigate losses, wherein the sum obtained from the sale will form a reduction towards the damages. In their submission D1 argues this sum of RM4m should not be deducted from the quantum of damages as they had suffered losses from such sale. I am unable to accept such argument because D1 cannot have it both ways ie claiming for loss of profit based on the assumption that the houses on the project land were fully sold upon subdivision, conversion and completion, while also receiving monetary consideration from selling the same land in its current status as agricultural land.

[67] Further to the above observation, I am also suspicious of the alleged sale of the project land in 2018. This event was revealed during the cross-examination of DW2 (see pp 289–291 of encl 111). There is no documentary evidence to show that it was sold, save for DW3's oral testimony

that it was sold for 'about RM4m,' indicating a loss of RM780,000 from its 2008 value of RM4,780,000. Applying simple logic, this cannot be true since the project land which is located on the eastern side of Putrajaya would have significantly appreciated in value over the ten-year period. Even with a conservative annual growth rate of 6%, such land would be worth at least RM8.5m in 2018. In fact, according to D1's own valuation evidence, the project land, in its agricultural status, was valued at RM9m as of 11 June 2015 (see pa 1 of D1's additional bundle of documents at encl 91).

[68] In general, wrongful termination of a loan by the financier does not mean that the borrower can remain passive. It is crucial for the borrower to show that they made all efforts made to mitigate damages. In a case where a developer had taken a different route by disposing the development land, they still have to show that reasonable steps were taken to mitigate damages. This principle ensures that the party suffering a loss does not recover more than necessary and encourages responsible behavior in minimising the impact of breaches or wrongful acts.

[69] However, in the current scenario, I am constrained to rely on the unchallenged testimony of DW3 and accept that it was sold for 'about RM4m' as such admission ultimately reduces the quantum of damages. Consequently, this amount will be deducted from D1's entitlement to damages, as the project land would have been subdivided and sold if the project had proceeded as planned. Nevertheless, no damages will be awarded for the loss resulting from this mitigation exercise (RM780,000) as the exact sale price remains unclear as no sale and purchase agreement was produced by D1.

[70] Having decided on the issue, I believe that it is still open for the plaintiff to investigate and find out whether the said land was indeed sold, whether it was sold on an arm's length basis, and under what circumstances was it sold at an undervalue. This is so as DW3 had only disclosed such sale during the end of her cross-examination and thus depriving the plaintiff from verifying what was being said at that point in time.

[71] From their own evidence, despite being a sole-purpose company established to develop the project land, D1 is nonetheless a subsidiary of Kamuja Corp Sdn Bhd, which specialises in management consulting and the construction industry. Verification or rebuttal evidence may be obtained from the accounts submitted by D1 or its holding company to the Companies Commission of Malaysia regarding the disposal of the project land from D1's books, or by obtaining the relevant transfer forms from the Land Office, which would reveal the purchaser's identity and the transaction amount. Perhaps for the plaintiff, what is done can still be undone.

DECISION

[72] D1 's appeal in encl 130 is therefore allowed with costs. The Registrar's decision to grant nominal damages of RM5,000 and costs of RM17,000 is set aside. In its stead, I award damages in the sum of RM7,506,518.67 in favor of D1, with interest of 5%pa on the judgment sum from 6 June 2016 till realisation.

[73] Interest is set to commence from 6 June 2016 to account for the three-year construction period that would have started in June 2013. Costs of RM30,000 is awarded in favor of D1, covering the assessment proceedings before the Registrar as well as this appeal.

D1's appeal allowed, registrar's decision set aside and D1 awarded RM7,506,518.67 in damages with interest at 5%pa on the judgment sum from 6 June 2016 until realisation and RM30,000 costs.

Reported by Ashok Kumar